

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 27 August 2003

BALCA Case Nos.: 2002-INA-102, 2002-INA-113, 2002-INA-132, 2002-INA-134, 2002-INA-139, 2002-INA-146, 2002-INA-159, 2002-INA-160, 2002-INA-162, 2002-INA-163, 2002-INA-164, 2002-INA-166, 2002-INA-203, 2002-INA-204, 2002-INA-205, 2002-INA-206, 2002-INA-207, 2002-INA-208, 2002-INA-209, 2002-INA-210, 2002-INA-211, 2002-INA-212, 2002-INA-213, 2002-INA-231, 2002-INA-232, 2002-INA-235, 2002-INA-243, 2002-INA-270, 2002-INA-272, 2002-INA-287, 2002-INA-288, 2002-INA-300, 2002-INA-304, 2003-INA-47, 2003-INA-113, 2003-INA-115

In the Matters of:

Case No.: 2002-INA-102

COMPRESSION, INC., *Employer,*
on behalf of

DANIEL TELLEZ-HUERTA, *Alien.*

Case No.: 2002-INA-113

MAIMONIDES ACADEMY, *Employer,*
on behalf of

VICTOR M. ORELLANA-ALVARADO, *Alien.*

Case No.: 2002-INA-132

CAPISTRANO VALLEY REALTY, INC., *Employer,*
on behalf of

YVONNE LIZARZABURU, *Alien.*

Case No.: 2002-INA-134

EL MONTE PLASTICS, INC., *Employer,*
on behalf of

MARTIN LUGO-VELARDE, *Alien.*

Case No.: 2002-INA-139

TUNSTIL PLASTERING, INC., *Employer,*
on behalf of

JAIRO MAGANA-VALLADARES, *Alien.*

Case No.: 2002-INA-146

S & S PRECISION MFG., INC., *Employer,*
on behalf of

RODOLFO HERNANDEZ, *Alien.*

Case No.: 2002-INA-159

PACIFIC COAST WEATHERPROOFING, *Employer,*
on behalf of

MARTIN ESPARZA, *Alien.*

Case No.: 2002-INA-160

PACIFIC COAST WEATHERPROOFING, *Employer,*
on behalf of

ANGEL GARCIA, *Alien.*

Case No.: 2002-INA-162

METALFAB, INC., *Employer,*
on behalf of

JUAN LOPEZ-MARTINEZ, *Alien.*

Case No.: 2002-INA-163

EL MONTE PLASTICS, INC., *Employer,*
on behalf of

JESUS CELESTINO-DUARTE, *Alien.*

Case No.: 2002-INA-164

FRAMING FABRICS AND MOULDING INTERNATIONAL, *Employer*,
on behalf of

SALVADOR CASTILLO DE LA CRUZ, *Alien*.

Case No.: 2002-INA-166

BOBBY'S HIDEAWAY CAFE., *Employer*,
on behalf of

FEDERICO OLASCOAGA-TORRES, *Alien*.

Case No.: 2002-INA-203

PRAJIN ONE STOP DISTRIBUTORS, *Employer*,
on behalf of

DANIEL LOMELI-COVARRUBIAS, *Alien*.

Case No.: 2002-INA-204

ATLAS CO., *Employer*,
on behalf of

CESAR FLORES-ANDRADE, *Alien*.

Case No.: 2002-INA-205

ROCKWELL'S CAFÉ & BAKERY, *Employer*,
on behalf of

JOSE VALENZUELA-CUEVAS, *Alien*.

Case No.: 2002-INA-206

BIOTECH DENTAL LABORATORY, *Employer*,
on behalf of

GRACIELA LOPEZ, *Alien*.

Case No.: 2002-INA-207

EL MONTE PLASTICS, INC., *Employer,*
on behalf of

MIGUEL LANDIN-GARCIA, *Alien.*

Case No.: 2002-INA-208

ARRAMBIDE CONTRACTING, *Employer,*
on behalf of

ORLANDO JUAREZ-HERNANDEZ, *Alien.*

Case No.: 2002-INA-209

BIOTECH DENTAL LABORATORY, *Employer,*
on behalf of

BEATRIZ ACACIA-DELRASO, *Alien.*

Case No.: 2002-INA-210

SPARROW CONSTRUCTION, *Employer,*
on behalf of

JUAN RUVALCABA-MARES, *Alien.*

Case No.: 2002-INA-211

EL MONTE PLASTICS, INC., *Employer,*
on behalf of

JUAN VALDEZ-GONZALEZ, *Alien.*

Case No.: 2002-INA-212

S & S PRECISION MFG, INC, *Employer,*
on behalf of

RUPERTO ROMAN, *Alien.*

Case No.: 2002-INA-213

BIOTECH DENTAL LABORATORY, *Employer*,
on behalf of

JULIO A. DE GYVES-MOLLER, *Alien*.

Case No.: 2002-INA-231

VIP EXPRESS, INC., *Employer*,
on behalf of

SANDRA RAMOS-MARES, *Alien*.

Case No.: 2002-INA-232

VIP EXPRESS, INC., *Employer*,
on behalf of

SANDRA FRANCO-RUIZ, *Alien*.

Case No.: 2002-INA-235

MERCHANTS BUILDING MAINTENANCE, *Employer*,
on behalf of

ANTONIO BRAVO-SANTOS, *Alien*.

Case No.: 2002-INA-243

SMOGS PLUS, *Employer*,
on behalf of

GUDINO ERNESTO RIZO, *Alien*.

Case No.: 2002-INA-270

PROGRESSIVE PIZZA, *Employer*,
on behalf of

MANUEL RAMOS GARCIA, *Alien*.

Case No.: 2002-INA-272

RICK'S CAFÉ CATALINA, *Employer,*
on behalf of

RICARDO RODRIGUEZ-PADILLA, *Alien.*

Case No.: 2002-INA-287

GARDENING BY MACGREGOR, *Employer,*
on behalf of

MARIANO ECHEGOYEN, *Alien.*

Case No.: 2002-INA-288

SANTOS PRECISION, INC., *Employer,*
on behalf of

JOSE VAZQUEZ-BAUTISTA, *Alien.*

Case No.: 2002-INA-300

CALIFORNIA PIZZA KITCHEN, *Employer,*
on behalf of

FAUSTINO LOPEZ-MALDONADO, *Alien.*

Case No.: 2002-INA-304

ORTEGA CUSTOM MASONRY, *Employer,*
on behalf of

EFREN ORTEGA, *Alien.*

Case No.: 2003-INA-047

JW CONTRACTING CORPORATION, *Employer,*
on behalf of

DAVID AVELLANEDA-PEREA, *Alien.*

Case No.: 2003-INA-113

SUNBEAM TRAILER PRODUCTS, INC., *Employer,*
on behalf of

WILLIAM CAMACHO-SANCHEZ, *Alien.*

Case No.: 2003-INA-115

INTERIOR DEMOLITION, INC., *Employer,*
on behalf of

ELADIO RAMIREZ-ALMANZA, *Alien.*

Appearances: Leonard Stitz, Esquire
 David Williams, Esquire
 For Employers and Aliens ¹
 Victor M. Cueto, Esquire
 For Alien in 2002-INA-300

Certifying Officer: Martin Rios
 San Francisco, CA

Before: Burke, Chapman and Vittone
 Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

¹ In most of the cases, the Stitz law firm was retained by Employers following the death of Employers' original attorney, Jean Pierre Karnos. In a few of the cases, attorney James G. Roche had entered an appearance, but the present counsel of record is the Stitz firm. In a few of the cases, the Stitz firm also represents the Alien beneficiary.

In Case No. 2002-INA-300, on June 19, 2003 attorney Victor M. Cueto filed a Form G-28 indicating that he is now the attorney of record for the Alien, requesting that the case file be provided under the Freedom of Information Act, and that the case be held in abeyance until he had an opportunity to review the case. The Board forwarded Mr. Cueto's FOIA request to the appropriate FOIA Coordinator who immediately sent Mr. Cueto a copy of the Appeal File. By order dated June 27, 2003, the Board informed Mr. Cueto that it would not rule on his motions until proper service on the other parties and counsel of record had been effected. In addition, the Board notified Mr. Cueto that the matter was currently pending before a panel of the Board and that a decision was likely to be issued soon. To date, the Board has had no further written communication from Mr. Cueto. There is no indication that the Stitz law firm has withdrawn as counsel. Accordingly, we include Case No. 2002-INA-300 in this consolidated decision.

DECISION AND ORDER

PER CURIAM. This consolidated opinion arises from Employers' requests for review of denials by a U.S. Department of Labor Certifying Officer ("CO") in 36 separate alien labor certification applications.² While the job offerings and facts in each case are slightly varied, the determinative issues on appeal are the same.³ *See* 29 C.F.R. § 18.11. Specifically, the determinative issues in these appeals are: (1) whether Employers have established good faith recruitment where Employers' copies of certified letters and application forms sent to applicants were not furnished to the CO when requested; (2) whether Employers' requests for additional information, already listed on an applicant's resume, constitutes a measure meant to discourage U.S. applicants; and (3) whether Employers' unsuccessful attempts to contact U.S. applicants solely by certified mail constitutes a good faith recruitment effort.⁴ Although the cases are consolidated for decision, each application has been independently considered, and the case decided on the individual records upon which the CO denied certification, Employers' requests for review, and the written arguments of the parties. 20 C.F.R. § 656.27(c).

² Alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

³ In Case No. 2002-INA-132, the Certifying Officer ultimately denied certification on grounds different from those addressed here. The CO's reason for denial was that Employer's rebuttal was non-responsive because it lacked Employer's signature. This conclusion, however, is not supported by the regulation 20 C.F.R. § 656.25(d)(1). Although the CO finds Employer's rebuttal to be non-responsive due to the lack of Employer's ink signature, there is no regulatory requirement that Employer's signature actually appear on the rebuttal. *See Ideal Employee Management, Inc.* 2002-INA-120 (July 1, 2002) (citing) (Environmental Maintenance Co., 2000-INA-72 (May 31, 2001) (signature of an employer's counsel is evidence that the rebuttal was properly signed by the employer through counsel). Nonetheless, the Notice of Findings raised the issue of whether requiring applicants for an executive position to submit an application when Employer already possessed detailed resumes and cover letters was merely redundant and discouraging to applicants. (2002-INA-132 at AF 44). Employer fully addressed this issue in rebuttal and, in fact, briefed this issue rather than the signature issue in its appellate brief before this Board. Accordingly, we include Case No. 2002-INA-132 in this consolidated decision. *See Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*) ("Under the regulatory scheme of 20 C.F.R. Part 24, rebuttal following the NOF is the employer's last chance to make its case. Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued.").

⁴ Because the denial of labor certification in each of the consolidated cases was proper under one or more of these three grounds, it is unnecessary to review other issues that may have been raised in individual cases.

DISCUSSION

(1) Failure to produce letters and applications sent to U.S. applicants

In Case Numbers 2002-INA-102; 2002-INA-159; 2002-INA-160; 2002-INA-166; 2002-INA-203; 2002-INA-206; 2002-INA-207; 2002-INA-209; 2002-INA-213; 2002-INA-231; 2002-INA-287; 2002-INA-304; 2003-INA-47; 2003-INA-113 and 2003-INA-115, the CO issued a Notice of Findings (NOF) indicating intent to deny the application on the ground that good faith recruitment efforts were not made and thus Employers had unlawfully rejected U.S. workers. The CO noted that although Employers provided copies of the certified mail receipts as proof that letters were mailed to the applicants, copies of the letters themselves were not provided and no explanation was given for requiring an employment application to be submitted before the interview was scheduled. As a remedy, the CO advised Employers to provide a copy of the cover letter and the application mailed to the U.S. applicants and explain why the applicants were required to submit an application when their resumes already indicated that they were qualified. In many of the cases none of the requested documents were submitted by the applicable Employer. In some instances, Employers sent in a "form" copy of the certified letter which the CO found indicated neither when the letter was sent nor its date of certification.

In *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*), the Board held that "where a document has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the document, if requested by the Certifying Officer, must be adduced." In the instant case, the CO reasonably requested documentation which was relevant to the issue of good faith recruitment. Employers' failure to produce the requested documents is grounds for affirming the denial of labor certification. See *The Black Iris, Inc.*, 2002-INA-57 (Feb. 7, 2003); *Felix Reyes Carpenter*, 2002-INA-55 (Feb. 20, 2003).

(2) ***Discouraging U.S. applicants***

In Case Numbers 2002-INA-102; 2002-INA-132; 2002-INA-134; 2002-INA-139; 2002-INA-160; 2002-INA-204; 2002-INA-205; 2002-INA-206; 2002-INA-207; 2002-INA-208; 2002-INA-209; 2002-INA-210; 2002-INA-212; 2002-INA-213; 2002-INA-231; 2002-INA-232; 2002-INA-235; 2002-INA-243; 2002-INA-270; 2002-INA-272; 2002-INA-287; 2002-INA-300, 2002-INA-304, 2003-INA-113 and 2003-INA-115, the CO questioned whether Employers' recruitment letter and the requirement of completion of an additional application were measures intended to discourage U.S. applicants from pursuing the jobs offered. To determine that Employers made a good faith effort in recruitment and to confirm that the hiring practices applied to the U.S. applicants were normal for Employers, the CO requested that Employers supply a copy of the cover letter and application mailed to the applicants, and a copy of the Aliens' application. Employers either never submitted the requested copies or only submitted copies of 'form' letters – and not the actual letters – sent to U.S. applicants. As found above, the failure to submit these reasonably requested documents is, by itself, grounds for denial of the certification. In addition, we affirm the CO's finding that Employers placed unjustified hurdles in the path of U.S. applicants in an apparent attempt to discourage their pursuit of the jobs.

An employer must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 C.F.R. § 656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. § 656.20(c)(8). Therefore, an employer must take steps to ensure that it has lawful job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications. Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such a good faith requirement is implicit. *H.C. LaMarche Enterprises, Inc.*, 1987-INA-607 (Oct. 27, 1988). If employers act in a way which indicates lack of good faith recruitment, such as actions which discourage U.S. workers from pursuing their applications, denial of certification is appropriate. *Vermillion Enterprises*, 1989-INA-43 (Nov. 20, 1989); *Berg & Brown, Inc.*, 1990-INA-481 (Dec. 26, 1991). In similar cases also handled by the law firm representing Employers involved in the instant appeals, panels of the Board

have found that the recruitment practices employed failed to demonstrate good faith in recruitment. In *The Black Iris, Inc.*, 2002-INA-57 (Feb. 7, 2003), this panel affirmed the CO's denial of labor certification where the employer failed to provide, as reasonably requested by the CO, a copy of a letter and application sent to applicant – the panel noting that extra screening steps will be given strict scrutiny because of their chilling effect on U.S. applicants. In *Sunview Properties*, 2002-INA-80 (Oct. 11, 2002), the panel held that sending letters to applicants requiring completion and submission of an application form when the employer already had their resumes was an unnecessary hurdle in the recruitment process.

Likewise, in the instant appeals, Employers' failure to provide documentation showing the good faith reasons for requiring an employment application to be submitted before the interview was scheduled constitutes a failure to address the appearance of an improper chilling effect on U.S. applicants. Accordingly, the CO properly denied labor certification on this basis.

(3) *Reasonable efforts to contact qualified U.S. applicants - more than a single attempt at contact required.*

In Case Numbers 2002-INA-102; 2002-INA-113; 2002-INA-132; 2002-INA-134; 2002-INA-139; 2002-INA-146; 2002-INA-163; 2002-INA-164, 2002-INA-166; 2002-INA-203; 2002-INA-204; 2002-INA-205; 2002-INA-208; 2002-INA-210; 2002-INA-211; 2002-INA-212; 2002-INA-232; 2002-INA-243; 2002-INA-270; 2002-INA-288; 2002-INA-300; 2003-INA-47, 2003-INA-113 and 2003-INA-115, after the recruitment process was completed Employers submitted their results, listing U.S. applicants who responded. According to Employers an attempt was made to contact these applicants via certified mail; however, the correspondence was returned by the postal service for various reasons, such as “No Such Number,” “Unclaimed” or “Undeliverable.”⁵

⁵ In Case No. 2002-INA-164, the U.S. applicant had provided a different address in his cover letter than the one shown on his resume and requested that any correspondence be sent to the address shown in the cover letter. The NOF noted that Employer appeared to have ignored the applicant's request. Employer's only response in rebuttal was it could not fathom why the cover letter and the resume showed different addresses and blamed the resume for not being accurate.

An employer must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 C.F.R. § 656.21(b)(6). In *M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 8, 2001) (*en banc*), the Board described prior rulings on what constitutes adequate documentation of good faith efforts to contact and recruit U.S. workers. In pertinent part, the Board wrote:

What constitutes a reasonable effort to contact a qualified U.S. applicant depends on the particular facts of the case under consideration. Where an employer establishes timely, actual contact, *ipso facto*, a reasonable effort is proved. *HRT Clinical Laboratory*, 1997-INA-362 (March 10, 1998). In some circumstances it requires more than a single type of attempted contact. *Yaron Development Co., Inc.*, 1989-INA-178 (Apr. 19, 1991) (*en banc*). [. . .] It has been held that "Where there are a small number of applicants, sending a letter may not be enough to demonstrate good faith, especially when the employer is provided with telephone numbers to contact applicants. *Diana Mock*, [19]88-INA-255 (April 9, 1990)." *American Gas & Service Center*, 1998-INA-79 (Jan. 12, 1999). It has also been held that where certified letters were sent to nine U.S. applicants and none responded, a reasonable effort required more than that single attempt. *Sierra Canyon School*, 1990-INA-410 (Jan. 16, 1992); *see also Johnny Air Cargo*, 1997-INA-123 (Mar. 4, 1998); *Therapy Connection*, 1993-INA-129 (June 30, 1994).

M.N. Auto Electric Corp., 2000-INA-165 (Aug. 8, 2001) (*en banc*).

In the instant cases, U.S. applicants appear to have been fully qualified for the positions at issue. Some Employers have provided proof that they sent, by certified mail, correspondence which was returned undelivered to the applicants. Employers argue that this is sufficient evidence of good faith recruiting despite the fact that Employers had the applicants' telephone numbers and failed to make any attempt to contact the applicants by telephone. Employers also argued that the U.S. applicants' non-receipt of the certified letter was illustrative of the applicants' lack of motivation, and

thus, a lawful, job-related ground for rejection.

In the rebuttals, Employers set forth an incorrect legal standard with regard to what constitutes reasonable recruitment effort. Relying on *Light Fire Iron Works*, 1990-INA-2 (Nov. 20, 1990), Employers argued that an employer's sole attempt to contact an applicant through certified mail evinces a reasonable recruitment effort. However, this Board has held that the only instance when an employer may rely solely on certified mail to demonstrate a sufficient recruitment effort is a situation where "it is crystal clear that the applicants' non-response evinces a lack of further interest in the job." *M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 8, 2001) (*en banc*), *limiting Tile Tech, LLC*, 1997-INA-335 (June 10, 1998); *Light Fire Iron Works*, 1990-INA-2 (Nov. 20, 1990); *Wash-N-Vac Carwash*, 1998-INA-59 (Jan. 27, 1999); *Simon's Precision Machine*, 1988-INA-105 (July 31, 1989). In the cases under consideration in this consolidated decision, the records do not contain evidence showing that the U.S. applicants chose not to receive the Employers' correspondence, as argued by Employers. On the contrary, the undelivered letters simply put the Employers on notice that the U.S. applicants had not received the letters.

Employers relied on the U.S. applicants' non-receipt of the certified letter as a basis for their determination that the applicants were lacking in motivation. Such a determination, however, is based on an unreasonable assumption. The U.S. applicants' non-receipt of the certified letter does not evince a clear lack of interest in the position, and their non-receipt of certified mail does not give rise to a lawful, job-related reason for rejecting those applicants.

In order to make a reasonable recruitment effort, Employers were obligated to attempt to contact the U.S. applicants at the telephone numbers found on the resumes once it was clear that the delivery of the certified letter was unsuccessful. Due to Employers' failure to telephone the U.S. applicants, we find that Employers did not recruit U.S. applicants with good faith, and affirm the CO's denials of labor certification for failure to establish good faith in recruitment.

ORDER

The Certifying Officer's denials of labor certification in the above-captioned cases are hereby **AFFIRMED.**

For the panel:

A

JOHN M. VITTON

Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.